

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
)
Digital Broadcast Copy Protection) MB Docket No. 02-230
)
)

REPLY COMMENTS OF NEW YORKERS FOR FAIR USE

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I INTRODUCTORY COMMENTS

New Yorkers for Fair Use first thanks the FCC for the consideration and care and time that the staff must have spent to transform and publish the thousands of comments submitted by groups and individuals in response to NPRM 02-231.

It may be instructive to note that in a prospective future world, a world in which the Broadcast Flag has been mandated, the FCC offices might reasonably expect to have encountered greater difficulties in handling proceedings such as this. In this future, the FCC might receive some comments via digital broadcast, and perhaps some flag of the many flags that would be necessary in any realistic BF system, might not have been set properly or perhaps might not have been read properly.

There is enough difficulty today in transforming, searching, indexing, and arranging copyrighted and public domain works, even with untrammelled computers and untrammelled networks, that a new and different kind of software, intended precisely to make access and distribution impossible in certain instances, would surely interfere here, at this living nexus of citizen, small business, cartel, monopoly, and governmental regulatory agency.

II PUBLIC RESPONSE TO THE "BROADCAST FLAG" MANDATE PROPOSAL

New Yorkers for Fair Use wishes to point out the remarkable phenomenon that more than 5600 public comments have been lodged in response to this proposal.

Some of these comments that are standardized texts express the commentator's opinions near enough for her to sign them and send them in with relatively little reflection. In some cases reading the text, thinking about what it says, signing, and then pressing a button is enough to send the comment to the FCC. At the time we analyzed the comments several weeks ago, there were a total of 5,667 comments posted to the FCC's public comments system on this matter, 77% of which (4,382) were in the standardized texts category, including the texts composed by Digital Consumer (3,560 / 63%) and Citizens for a Sound Economy (822 / 15%).

However, perhaps an even more reliable sign of the public's great concern for this issue, is the 1,285 other comments that citizens composed on the basis of their own reflection. These are the comments whose words are mostly the commentator's own, and thus copyrighted under United States law at the moment of composition.

The volume of comments, in both of these categories, expressing opposition to the imposition of the Broadcast Flag Mandate, speaks for itself.

Among the self-composed comments, the care that their authors took in their composition is striking, as is the strength of their opposition. There are almost no comments, except from large cartels, or highly regulated very large corporations, all with strong perceived direct interests in the outcome, that express support for the broadcast flag mandate. There are also a few comments from large corporations and trade organizations opposed to the BFM and, as in the case of the pro-BFM comments, most are from bodies with perceived direct interests.

(Note: our method for separating standardized texts was approximate, a matter of flagging comments which used a number of distinguishing phrases. This efficient method could not hope to separate those instances in which the standard text was edited by the commentator or in which the commentator may have added original commentary.)

Let us now examine a different classification of the comments.

III " BROADCAST FLAG" MANDATE COMMENTS

A. Proponents of the " Broadcast Flag" Mandate

Here are the comments which support imposition of the entire system that would be necessitated to realize the objectives of the broadcast flag proposal:

American Conservative Union

http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513394649

CBS Television Affiliates Association

http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513395009

Digital Transmission Licensing Administrator, LLC

http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513395250

Directors Guild of America, Inc.

http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513388991

DIRECTV, Inc.

http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513397369

Information Technology Industry Council (ITI)

http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513394788

Media Access Group at WGBH

http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513394503

Motion Picture Association of America, Inc., et al.

http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513395156

Motorola

http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513397321

National Broadcasting Company, Inc.

http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513394476

National Cable & Telecommunications Association

http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513393934

National Football League, et al.
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513394221

National Music Publishers' Association
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513307461

NBC Television Affiliates Association
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513394973

North American Broadcasters Association
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513395146

Panasonic / Matsushita Electric Corporation of America
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513289166

Thomson Inc.
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513394743

Viacom
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513394608

Walt Disney Company and ABC Television Network
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513394657

i. General Response

In each case, except for the American Conservative Union -- whose comment simply seems to us to be 180 degrees from what we would expect from an organization which supports property rights, privacy rights, and free markets -- the organizations, whether for profit or not, express their support because they fear the consequences of a continuation of our present system of private ownership of computers and free private, tribal, business, and public use of the Net. All their analyses proceed from the bizarre assumption that hypothetical losses of projected profits from untried and, mostly, incoherent theories about possible future "business models" justify an end to the system of strong rights of the individual citizen under which they have prospered these last

twenty years. These groups have famously cried "Wolf!" before, and yet now Hollywood makes half its gross from tapes and DVDs of their product.

They have also failed to develop the computer and the Net, and have lagged for years behind academic, individual, and tribal use of these wonderful works of Man. Their claim to now simply own, by what right is not clear except perhaps force majeure, both every individual computer and all means of mass communication, will, we are confident, be rejected by the People when the People hear of it.

We fully expect the FCC to also reject this claim, perhaps merely prudentially, so as to avoid revisiting this issue when citizens start to realize that their devices do not work as well under a broadcast flag mandate as under our present system of strong rights of the individual to copy, transform and arrange material in the privacy of one's house, and to risk copyright infringement by use of the Net to send and receive works, both works whose copyright the individual holds, and works whose copyright is held neither by the sender nor by the receiver.

ii. " Copy Protection" versus " Redistribution Control "

Some of these Pro-BFM comments recognize that we are here dealing with two quite distinct, but directly abutting, bundles of rights and practical powers. Several of the large pro-BFM organizations admit that I have a right to do as I please in the privacy of my own home. The phrase of art here is "The BFM, done right, only affects redistribution, not copying and transformation in the privacy of the home."

New Yorkers for Fair Use agrees that the right of free use of material copyrighted to others in the privacy of one's house is an important principle which the FCC must uphold, at risk of assaulting the most

basic property rights of Americans. But we disagree that the second bundle of rights is not ours anymore.

Any perfectly working system of "broadcast flag" hardware and software, which allowed free copying and transformation in the home, would still constitute prior restraint, on a massive scale and of an incontinent nature, on our rights of free speech and free assembly. The underlying assumption of any "broadcast flag" system is that certain large interests own all our computers and all our Net, and that we the People will have to make do with what privileges they grant us.

This, of course, is not the way things really are. Companies and cartels are transitory instruments of individuals, tribes, and groups, and have no independent claims to own all the world. And when the world changes, as it is now changing with the coming of massive compute power available to individuals, and massive communication power available to individuals, well, institutions such as companies and cartels change more slowly, and so some will suffer diminution of stock value, loss of customers, fall in profits, etc..

Of course, other instruments of groups of free men, women, and children, will rise in value, grow in customers, increase in profits, etc. It is ever thus, and the FCC can only hurt the natural flexible growth and spread of new powers to all persons on earth by agreeing that a few large frightened and insufficiently intelligent cartels and monopolies be granted complete ownership of the means of digital production and distribution.

On a less grand note, let us point out that the imposition of a system of BF which respects the in-the-house bundle of rights and practical

powers while granting the degree of suppression of the fundamental freedom to distribute which is necessary to assure no infringement, is much harder to accomplish than the already difficult-to-implement proposed "No copy" systems of BF.

iii. Establishment of Precedent

Finally there is one point, mentioned by the American Music Publishers Association, with which we agree: In imposing the "broadcast flag," the FCC may be setting a precedent which would affect other media and means. Where we differ from these pro-BFM commentators is that we think BFM is very bad.

B. Opponents of the "Broadcast Flag" Mandate

i. "Consumer Rights"

We now discuss the comments by advocacy groups which might be classified as "Against the BFM, on the basis that it will impair convenient use of traditional media in the home.".

Center for Democracy and Technology
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513394761

Consumer Electronics Association
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513397277

Consumer Federation of America
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513391743

Public Knowledge and Consumers Union
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513394714

This line of argument is sometimes called the "consumer rights" argument. New Yorkers for Fair Use rejects this line of argument in principle -- though, as mentioned in our opening paragraphs, we agree that the imposition of any broadcast flag mandate would indeed make many things even more inconvenient than they are today. Many of the organizations making this argument are about twenty years old, and they helped fight for our right to use VCRs in the home. The leaders of these organizations see the present opposition to DRM as a continuation of that old and passionate and honorable battle.

This line of reasoning is correct in that the right to private ownership and private use of the VCR is a part of our property rights and a part of our freedom to use information, absent any specific harms to certain

protected classes of individuals and organizations. But the entire ground of the old VCR battle was different from the present battle.

The VCR is a limited device which mostly only serves in most people's houses to copy the productions of large movie makers and TV show makers. The VCR may be part of a full studio to make music, movies, etc., in an individual's house or a company's studios, but it is not a universal digital production and distribution device, as a computer connected to the Net is. So perhaps the battle over the VCR might be called a battle between "consumers" and "producers," though if that were felt to have been the full story, one might doubt that our side could have won. But the fact that the battle was really a battle for our freedom to make use of information as we see fit was always understood implicitly. Indeed that was the deep unconscious spring of our side's passion. But because at the surface the issue was phrased as "consumers versus producers," those lines of argument have come down without sufficient critical examination to the present discussion.

Opposition to DRM is a struggle of the whole world for our property rights and our equally important rights of free speech and free assembly, and for the right of every citizen to be treated in the manner in which every citizen is treated in a free country: not as a consumer, but as a producer and a transformer of works of the mind and heart. The weakness of the old "consumers vs producers" line of reasoning, a weakness based on an inadequate analysis, is that it proposes that we are fighting for what few privileges the cartels and monopolies will grant us.

In other words, proponents of the "consumers vs producers" line give away the whole game before the discussion begins. They start their argument by agreeing that really, at bottom, certain special interests

control and own everything and they are the only productive force in the world.

Thus "consumers vs producers" is not the line upon which NYFU fights. We do not come to the table pleading for scraps. Our rights and practical powers are not grants from Infotainment Central. We are all producers and distributors by right of copyrighted and other kinds of stuff and we stand on the Earth equal in stature and rights with Infotainment Central and Microsoft.

ii. Classic "Fair Use"

There is a small class of comments from librarians and scholars.

Library Associations

http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513394836

American Foundation for the Blind

http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513394595

Though their arguments may formally seem close to the "consumer rights" arguments they are of a completely different nature. We are rather at the locus classicus of "Fair Use." If we do not carefully preserve and keep alive the ancient liberties and new powers of the scholar, of the student, of the tinkerer, of the engineer, of the scientist, of the artist, of the politician, of the citizen, we will enter a new dark age. This is, after all, how the last Dark Age of Europe came about.

iii. Fundamental Principles

Finally, let us consider the class of the most forceful and important of all the comments. These are the comments opposing the broadcast flag

which found their arguments upon the fundamental principles of private property and freedom of speech and assembly. The number and power of these comments is extraordinary. They are mostly in individuals' own words, with some long important comments coming from organizations with professionals who have studied and understood just how bad the broadcast flag would be for our rights and our practical powers.

Electronic Frontier Foundation

http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513395409

Electronic Privacy Information Center (EPIC)

http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513393727

Free Software Foundation

http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513395086

LXNY

http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513395495

And numerous comments by individuals, catalogued here:

<http://rm.nyfairuse.org/flag/>

These comments share a number of insights which will surely become more widely understood. We will not rehearse here again these arguments. But we would like to suggest to the FCC that such arguments will be made by more and more people.

It is certain that the public and its advocates, including consumer advocates, will come to understand the more powerful arguments grounded in our rights as free men, women, and children. This move is already in progress: New Yorkers for Fair Use found it promising when, at a September 17, 2002 meeting at the Department of Commerce addressing other DRM mandate proposals, we discovered that many advocates of the public interest already were taking up the "owners and makers" position,

rather than addressing the question of government mandated content control from a "consumer rights" standpoint.

IV EXISTING TECHNOLOGY

Finally, New Yorkers for Fair Use would like to suggest that the FCC move slowly here. The entire technical landscape is shifting as we write. Shortly GNU Radio, a free, as in Free Software Foundation, software-defined general receiver and transmitter suite, will make available rich and flexible digital TV receivers at low cost:

<http://www.gnu.org/software/gnuradio/gnuradio.html>

If the FCC imposes the broadcast flag mandate, then the best and least costly Digital TV receiver will be made illegal.

New Yorkers for Fair Use

<http://www.nyfairuse.org>

APPENDIX: ADDITIONAL COMMENTS OPPOSED TO THE BROADCAST FLAG MANDATE

These comments do not fall into any of the above categories, and sometimes make arguments with implicit presuppositions which New Yorkers for Fair Use do not accept, or on principles which New Yorkers for Fair Use do not accept. We here make short replies to some of the arguments in this class of comments.

It is difficult for New Yorkers for Fair Use to make a strong enough disclaimer here before making response. New Yorkers for Fair Use does not support any reduction in our present rights, both the bundle of in-the-house rights and the bundle of rights of free speech, free assembly, and Fair Use, Fair Use in the broadest legal and political and philosophical senses. New Yorkers for Fair Use also does not support any reduction of our present practical powers of information transmission and transformation, whether by combination in restraint of trade, governmental suppression, or combination of these, or by any other means.

A. "DRM Needs Much Work"

The following comments include in their theses that "DRM needs much work."

Banks, LIN, Midwest, Post-Newsweek, Raycom
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513299133

Computer & Communications Industry Association
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513394889

Philips Electronics North America Corporation
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513394869

Veridian Corporation

http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513299133

Verizon

http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513394774

Home Recording Rights Coalition

http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513397442

One theme of the arguments here has already been mentioned above: the technical, legal, and economic difficulties of designing, implementing, and imposing any BF system which would entirely respect the in-the-house bundle of powers, while at the same time so suppress certain classes of transmission as to attain the dystopian vision of the MPAA. But there is another theme that is also persuasive within a limited discourse: no matter what principles of rights is assumed: the Broadcast Flag's sought-for effects can more easily be obtained by hard encryption, either with or without government mandates, either with or without cartel collusion against citizens' rights and powers. To repeat our disclaimer: New Yorkers for Fair Use rejects all claims of the Englobulators to own all the world's communications systems. But if the Englobulators want to try, we think that private competitive offerings will make the work of defending our rights and powers more likely to succeed, because free individuals and communities and companies are unlikely to buy trammelled devices, and unlikely to support trammelled communications systems when there are untrammelled competitors.

B. Oppose Government Mandate/Question FCC Jurisdiction

The following comments include the argument "The FCC has no power to dictate specific designs of computers."

Business Software Alliance et al.

http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513397470

Microsoft Corp.
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513402019

Pacific Research Institute
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513392775

TiVo Inc.
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513390640

Of course, New Yorkers for Fair Use agrees. Further, beyond the lack of power of the FCC to do these things, we believe that no government or cartel has by right such a terrible power to deny us our rights, as designers, users, owners, makers, and citizens.

C. Establish Voluntary Standards

The following comment includes the argument "Let various bodies freely decide upon arrangements to further their varied and complexly supporting and opposing desires.".

Information Technology Association of America
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513394917

Our disclaimer applies here with particular force, since some of those who make this argument support reduction of our rights and practical powers by means of agreements among cartels and monopolies, backed by unequal laws favoring these special interests.

But certainly freedom of speech and assembly, without threat of force, or economic oppression, includes the freedom to arrange affairs among individuals, tribes, and businesses. To this degree, as long as other

vital freedoms and powers are not suppressed, New Yorkers for Fair Use supports free arrangements.

D. Do Not Apply to Internet Carriers

This comment points out that if that unlikely but great evil, a Broadcast Flag Mandate, is forced on Broadcast Digital TV by the FCC, certainly carriers of transmissions over the Net must not fall under the shackles.

Internet Commerce Coalition and U.S. Internet Service Provider Association
http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513394602

New Yorkers for Fair Use agrees. It is better to have some free communications systems than to have none.